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No. 07-1130

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IN THE

Supreme Court of the United States

FRANCIS EDWIN FROELICH,
Petitioner,

v.

THE LEWIS LAW FIRM, PC,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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MOTION TO REMAND TO THE SUPREME COURT OF VIRGINIA WITH INSTRUCTIONS

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MOTION TO REMAND WITH INSTRUCTIONS

Petitioner hereby moves the Court to grant the Writ of Certiorari summarily and remand to the Supreme Court of Virginia with instructions to reconsider whether the Fairfax County Circuit Court was without jurisdiction over the parties' dispute in light of this Court's intervening decision in *Preston v. Ferrer*, 555 U.S. __, No. 06-1463, (February 20, 2008), interpreting the *Federal Arbitration Act* (FAA), 9 U.S.C. § 1 *et seq.* (2000 ed. and Supp. V).

FACTS

The Petition for a Writ of Certiorari, No. 07-113 (February 8, 2008) (Petition), presents the question of whether Petitioner was denied due process of law when the Circuit Court of Fairfax County, Virginia, enforced an attorney's charging lien against him, in favor of Respondent, without basic procedural safeguards. Among the procedural rights which the Virginia court denied Petitioner was the right to arbitration. Petition at 10. The retainer agreement between the parties, drafted by the Respondent, contained the following mandatory comprehensive arbitration clause:

> 14. Virginia Arbitration Agreement: We agree any controversy between us arising under, out of, in connection with or in relation to our attorney-client relationship and the legal services rendered by us will be submitted for resolution through binding arbitration proceedings. The process will be governed by Virginia Code §8.01-581.01, et. seq. Furthermore, any such arbitration or litigation proceedings shall take place in Fairfax or Arlington County, Virginia, under Virginia law. By agreeing to this clause to arbitrate, you waive certain rights. We suggest that

> you consult with independent legal counsel prior to signing this Agreement and accepting this clause.

Petitioner maintained throughout the state judicial proceedings that the Virginia courts did not have subject-matter jurisdiction over the dispute by virtue of the arbitration clause. Petitioner made application to the Fairfax County Circuit Court to allow the dispute to go to arbitration in the course of a hearing on February 2, 2007. See Petition at 10-11. A year earlier, on February 2, 2006, Petitioner had demanded arbitration before the Virginia Fee Arbitration Committee of the Virginia Bar. Respondent's Brief at 5. Based on Respondent's refusal to arbitrate in that forum, Petitioner filed a demand for arbitration with the District of Columbia Attorney Client Arbitration Board ("ACAB"), which is mandatory for District of Columbia Bar members, such as Respondent.[1]

Respondent's refusal to arbitrate before the Virginia Fee Arbitration Board is neither discussed nor refuted in Respondent's brief. Neither does Respondent explain why it waited to file its petition to enforce the attorney's liens for 11 months after it was granted leave to do so by the Fairfax court, on February 3, 2006. Respondent's Brief, at 5-6. After Petitioner attempted to commence arbitration proceedings for almost a year, culminating in the ACAB asserting jurisdiction over the parties' fee dispute, Respondent returned to the Fairfax County Circuit Court to file a petition to enforce the attorney's liens,

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[1] Under the rules of the District of Columbia Bar, submission to fee arbitration before the ACAB is mandatory for members of the Bar. District of Columbia Bar Rules, Rule XXII; *see Schwartz v. Chow*, 867 A.2d 230, 232 (D.C. 2005).

and Petitioner requested that the court allow arbitration to go forward.

Instead of recognizing its obligation to enforce the arbitration clause, the Fairfax County Circuit Court asserted jurisdiction and ordered that all efforts to seek arbitration be terminated. Petition Appendix at 5a.

Petitioner also attempted to challenge jurisdiction on appeal, presenting the following question to the Virginia Supreme Court for review:

> (1) Did the Circuit Court have jurisdiction to grant attorney's liens under Va. Code Ann. § 54.1-3932 . . . (d) where the attorneys' standard retainer agreement provided that all fee disputes would be arbitrated (Assignment of Error 4)?

Petition for Appeal of Francis Edwin Froelich, Supreme Court of Virginia, Record No. 0496-07-04, Circuit Court No. CL-07-879 (filed July 3, 2007), at 4.

The Supreme Court of Virginia decided not to hear the appeal, finding "no error," even though the Virginia courts exercised subject-matter jurisdiction over the dispute in spite of the mandatory arbitration clause. Petition Appendix at 1a.[2]

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[2] Respondent asserts in its brief, as it did in opposition to Petitioner's Petition for Appeal to the Virginia Supreme Court, that Petitioner's demand for arbitration before the Virginia Fee Arbitration Committee was invalid on the ground (without citation to authority) that Virginia Bar fee arbitration could not be compelled under the Virginia Arbitration Act. Respondent's Brief, at 5 (characterizing the Board, as well as the ACAB, as "improper forums"); *see also*, Brief of the Lewis Law Firm to Supreme Court of Virginia, at 12.

DISCUSSION

The Court should summarily remand this case because the Virginia courts did not have the benefit of the Court's intervening decision in *Preston v. Ferrer*, 555 U.S. ___, No. 06-1463, slip op. (February 20, 2008), when the Virginia courts held that they had jurisdiction to reach the merits of the parties' dispute.

The *Federal Arbitration Act* "supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." *Preston*, slip. op. at 1, citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). "[Q]uestions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court." *Id.*, citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

The question of whether Virginia law may vest jurisdiction in its courts or another forum, despite the existence of an arbitration agreement among the parties, has now been answered directly by this Court's holding in *Preston* interpreting the *Federal Arbitration Act*:

> We hold today that, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.

Preston, slip op. at 2. Once the parties agree in a contract to submit their disputes to arbitration, state courts lose subject matter jurisdiction under the FAA. As the Court explained:

> Preston's petition presents precisely and only a question concerning the forum in which the parties' dispute will be heard. . . . Ferrer relinquishes no substantive rights the TAA or other California law may accord him. But under the contract he signed, he cannot escape resolution of those rights in an arbitral forum.

Preston, slip op. at 12.

The jurisdiction of the arbitral forum is not dependent on a party actually seeking arbitration, but instead occurs once the parties have entered into a plenary arbitration agreement.[3] There was nothing for the Virginia courts to decide in this case, because Respondent's acknowledgement of the arbitration agreement ended the state courts' jurisdiction. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 85 (2002) (the arbitrator, and not the courts, decides procedural matters as well as the merits of a dispute.)

By asserting jurisdiction over the fee dispute and ordering that all efforts to arbitrate the dispute be terminated, the Virginia courts effectively held that Virginia law vests primary jurisdiction over an attorneys' fee and lien dispute in its courts, even when the parties had previously agreed to arbitrate "any controversy" between them. This application of Virginia law appears to be preempted by the FAA based on the holding in *Preston*.

Subject-matter jurisdiction may be challenged at any time during the original court proceeding, on

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[3] A federal court may consider only issues relating to the making and performance of the agreement to arbitrate. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967).

appeal, or by the Court *sua sponte*. The issue whether the Virginia courts had subject-matter jurisdiction was raised at all stages of the proceedings below. The intervening decision in *Preston* now provides an alternative basis for resolving the Petition for a Writ of Certiorari, summarily, by remanding the case to the Virginia Supreme Court with instructions to reconsider its disposition in light of *Preston*.

Because the Supreme Court of Virginia did not have the benefit of the *Preston* decision when it considered Petitioner's jurisdictional objection, that court should be given the opportunity to reconsider its decision before this Court takes further action. An order remanding this case to the Supreme Court of Virginia with instructions to reconsider the subject-matter jurisdiction of the Virginia courts in light of this Court's recent holding in *Preston* is appropriate.

CONCLUSION

For the reasons stated above, the Court should grant the writ of certiorari and remand to the Supreme Court of Virginia with instructions to reconsider the question whether the Virginia courts had jurisdiction over the dispute in light of the Court's intervening decision in *Preston*.

Respectfully submitted,

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